IN THE HIGH COURT OF DELHI AT NEW DELHI

C.R.P. No.749/2002

R.K.K.R. Steel Ltd. ...Petitioner
! through: Mr.R.S.Endlaw, Adv. and
Mr.Virendra Goswami, Adv.

VERSUS

$ Northern Steel & General Mills & Anr. ...Respondents
^ through: Mr.Harish Malhotra, Sr. Adv. with
Mr.Rajat Singh Jain, Adv. and
Mr.Tanuj Khurana, Adv.

RESERVED ON : 19-03-2007

% **D**ATE OF DECISION: 22-03-2007

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y

2. To be referred to the Reporter or not? Y

3. Whether judgment should be reported in Digest? Y

: PRADEEP NANDRAJOG, J.

1. A short but interesting question of law arises for consideration in the present petition.

2. Whether a prospective purchaser claiming right under agreement to sell is entitled to be impleaded as a defendant in the suit filed by the registered owner for recovery of the tenanted premises against the tenant? Needless to state, the question has

to be answered in light of the provisions of sub rule 2 of Rule 10 of Order 1 of the Code of Civil Procedure 1908.

3. A brief resume of the relevant facts is always handy before analyzing the legal position.

4. The impugned order is dated 30.4.2002. It has allowed an application filed by Shri Virendra Paul Daga (HUF) through its Karta Shri Krishan Kumar Daga for being impleaded as a defendant.

5. Petitioner's suit is for recovery of possession and mesne profits. The material allegations in the plaint are that the defendant 'Northern Steel & General Mills', a company registered under the Companies Act 1956 was inducted as a tenant for a period of one year with effect from 15.9.1985. That the tenant continued to occupy the tenanted property beyond the period of lease and vide notice dated 2.4.1998 tenancy was determined with effect from the midnight between 31.4.1998 and 1.5.1998. Rent being Rs.5,000/- per month, protection under the Delhi Rent Control Act 1958 was not available to the property. Since possession was not returned, plaintiff was entitled to recover possession.

6. In the written statement filed by the defendant it was pleaded that at one point of time, the defendant was a sole proprietory concern of M/s.Vikas Fittings Pvt. Ltd. It was denied that the defendant is a company registered under the Companies Act 1956. It was pleaded that currently the defendant is a sole

proprietory firm of one Shri Sanjay Daga. It was further pleaded that the tenancy in question was a camouflage for payment of Rs.5,000/- per month to the plaintiff by M/s.Virendra Paul Daga (HUF) to whom plaintiff had agreed to sell the suit property for a consideration of Rs.4,50,000/- vide agreement to sell dated 25.9.1985. It was stated that M/s.Virendra Paul Daga (HUF) had paid a sum of Rs.50,000/- pursuant to the agreement to sell.

7. It was further pleaded that since execution of sale deed would have taken some time it was agreed that on the balance sale consideration, M/s.Virendra Paul Daga (HUF) would pay interest @15% per annum and would take over possession of the property. That, pursuant to the said oral understanding the tenancy was created in the name of the defendant, then a sole proprietory unit of M/s.Vikas Fittings Pvt. Ltd., which in turn was controlled by M/s.Virendra Paul Daga (HUF).

8. A specific defence was raised in the written statement predicated on clause 7 of the agreement to sell between the plaintiff and M/s.Virendra Paul Daga (HUF). It was specifically pleaded as under:-

> "The plaintiff had no right to seek possession of the defendant and in order to secure the right of M/s.Virendra Paul Daga (HUF), Clause 7 of the said Agreement provided as under:-
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> > "7. That the plot and the super-structure constructed thereupon is presently rented out by the First Party to M/s.Northern Steel & General Mills through its sole proprietor M/s.Vikas Fittings Pvt. Ltd. of New Delhi at a monthly rental of Rs.5,000/- Rs.Five thousand only). The First

Party shall be entitled to realize this rental until the finalization of the sale in favour of the Second Party. However, in the event of the premises being vacated by M/s.Northern Steel & General Mills or its sole proprietor Vikas Fittings Pvt. Ltd. then the Second Party shall have the first option to become a tenant therein on similar terms and conditions."

9. In the written statement filed, it was specifically pleaded as under:-

"The aforesaid Clause 7 was inserted in the Agreement to Sell with the sole object that the possession should remain with Shri Virendra Paul Daga (HUF) either in the name of M/s.Northern Steel & General Mills or if it is vacated by the said M/s.Northern Steel & General Mills, the premises would be let out to M/s.Virendra Paul Daga (HUF) at the same rent. Later on, the defendant became the sole proprietorship concern of Shri Sanjay Daga and the amount was paid to the plaintiff at Rs.5,000/- per month on account of interest on the balance consideration of Rs.4,00,000/- which was payable by Shri Virendra Paul Daga (HUF) to the plaintiff.

That after entering into the Agreement to Sell M/s.Virendra Paul Daga (HUF) got the plan sanctioned of construction of the building on the aforesaid plot of land and raised construction of a building at a huge cost on the said plot of land. The completion certificate was issued by the Municipal authorities in the name of the plaintiff M/s.Virendra Paul Daga (HUF) had been paying the house tax for the said building. The plaintiff has given a General Power of Attorney in favour of Shri Prabhat Kumar and Shri Raj Kumar Daga. Shri Raj Kumar Daga is a relation of Sh.Virendra Paul Daga being the brother-in-law of Shri Krishan Kumar Daga son of Sh.Virendra Paul Daga and Shri Prabhat Kumar is also the grand child of Shri Virendra Paul Daga being the son of the daughter of Sh.Virendra Paul Daga. Shri Prabhat Kumar and Raj Kumar Daga had been prosecuting all the proceedings on behalf of the plaintiff for the assessment of property in dispute before the Municipal Corporation of Delhi and also in appeals before the Addl. District Judge, Delhi. M/s. Virendra Paul Daga (HUF) had been paying the Municipal taxes in respect of the property in dispute. As a matter of

> fact, although, a tenancy was shown in the name of the defendants as a camouflage for the payment of Rs.5,000/- per month, actually, M/s.Virendra Paul Daga (HUF) remained in possession of the said property. The building constructed on the said plot of land is in possession of M/s.Virendra Paul Daga (HUF). In view of the terms of the agreement to sell executed between M/s.Virendra Paul Daga (HUF) and the plaintiff, M/s.Virendra Paul Daga (HUF) is a necessary party to the present proceedings. The rights of the parties cannot be effectually and finally disposed off in the absence of M/s.Virendra Paul Daga (HUF)."

10. Notwithstanding the defence taken in the written statement, brief contours whereof have been noted herein above, M/s.Virendra Paul Daga (HUF) filed an application through its Karta Shri Krishan Kumar Daga seeking impleadment by virtue of the provisions of sub-rule 2 of Rule 10 of Order 1 of the Code of Civil Procedure 1908.

11. Substantially, averments made in the said application are the same as the averments made by the defendant in its written statement. Clause 7 of the agreement to sell entered into between the plaintiff and M/s.Virendra Paul Daga (HUF) was relied upon. In para 3 and para 6 of the application it was pleaded as under:-

> "3. That the aforesaid Clause No.7 was inserted in the Agreement to Sell with the sole object that the possession should remain with the applicant either in the name of M/s.Northern Steel & General Mills or if it is vacated by the said M/s.Northern Steel & General Mills, the premises shall be let out to the applicant at the same rent. The property was to remain in possession of the applicant and is still in possession of the applicant. The intention of showing M/s.Northern Steel & General Mills as a tenant under the plaintiff was to secure payment of Rs.5,000/-. It is further submitted that a Rent Agreement was executed on

25.9.85 but it was ante dated as 15.9.85. The plaintiff was entitled to a sum of Rs.5,000/- per month and was not liable to pay any amount such as is money and property taxes etc. which become the liability of the applicant/the tenant nominee of the applicant. Clause 3 was inserted in the following words:

> "That in addition to the rental reserved hereunder, the Tenant shall also pay annual lease money for this plot by depositing in the office of Mohan Cooperative Industrial Estate Ltd. New Delhi on behalf of the landlord and shall also pay the property taxes that may be claimed by the Municipal Corporation of Delhi from time to time against this property."

As stated above, M/s.Vikas Fittings Pvt. Ltd. was the family concern of the applicant. Later on, the defendant became the sole proprietorship of Shri Sanjay Daga one of the members of the applicant (HUF).

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6. That it will not be out of place to mention here that it was the intention of the parties that the plaintiff was only entitled to a sum of Rs.4 lacs or till the payment of Rs.4 lacs is made an amount of Rs.5,000/- per month. With that view the plaintiff had also executed a Power of Attorney dated 25.9.1985 in favour of S/Shri Raj Kumar Daga and Prabhat Kumar at the instructions of the applicant. Shri Raj Kumar Daga is a relation of the applicant being the son of brother-in-law of Shri K.K.Daga (Krishan Kumar Daga) the Karta of the applicant and Shri Prabhat Kumar is also the nephew of Shri Krishan Kumar Daga being the son of the sister of the applicant. The said Shri Prabhat Kumar and Raj Kumar Daga had been prosecuting all the proceedings on behalf of the plaintiff for the assessment of the property in dispute before the Municipal Corporation of Delhi and also in appeals before the Addl. District Judge, Delhi."

12. It was pleaded that the applicant was always ready and willing to perform its obligations under the contract and since plaintiff was in default a suit for specific performance was filed.

13. Opposing the application seeking impleadment plaintiff stated that a simple recovery suit could not be converted into a title suit and that M/s.Virendra Paul Daga (HUF) has an independent right to enforce a claim, if any, against the plaintiff under clause 7 of the agreement to sell dated 25.9.1985. It was stated that in the suit filed by the plaintiff the main controversy and the focal point is whether a plaintiff is entitled to the possession of a suit property as owner thereof if lease is validly determined. It was stated that the applicant has no direct interest in the property. It was further stated that presence of the applicant was not necessary to enable the Court to completely and effectually adjudicate upon and settle all the questions involved in the suit. It was stated that M/s.Virender Paul Daga (HUF) can enforce Clause 7 of the agreement, if at all, in the suit filed by it seeking a decree for specific performance.

14. After hearing arguments, vide impugned order dated 30.4.2002, the learned Trial Judge has opined that the applicant has a legal as well as equitable interest in the suit property and is therefore entitled to be impleaded as a tenant.

15. Learned counsel for the petitioner and the respondents have substantially reiterated the respective versions and their viewpoints on the legal position as have been culled out herein above from their respective pleadings. Therefore, I need not reiterate what the submissions were.

16. Shri Rajiv Endlaw, learned counsel for the petitioner

relied upon the following authorities:-

1. AIR 1977 Orissa 183, *Pravat Kumar Misra vs. Prafulla Chandra Misra & Anr*.
2. AIR 1981 Delhi 291, *Jiwan Dass Rawal vs. Narain Dass & Ors*.
3. AIR 1990 NOC 83 (P & H), *Dharam Singh & Anr. vs. Addu Ram & Ors*.
4. AIR 1992 Calcutta 283, *Vithalbhai Pvt. Ltd. vs. Union Bank of India*.
5. AIR 1994 Calcutta 85, *Smt.Sukumari Debi & Anr. vs. Shri Ramdas Ganguli*.
6. 1997 (40) DRJ 250, *Evangelical Church of India vs. North India Outreach Society*.
7. AIR 1998 Rajasthan 150, *Talib Hussain vs. Peer Azhar Hussain & Ors*.
8. 1999-CalLT-1-254, *Rama Chatterjee vs. Somnath Ghosal*.

17. Shri Harish Malhotra, learned senior counsel for the respondents relied upon the following authorities:-

1. AIR 2005 SC 2209, *Amit Kumar Shaw & Anr. vs. Farida Khatoon & Anr*.
2. 118 (2005) DLT 597, *S.S.Bakshi vs. P.M.Mathrani*.
3. 115 (2004) DLT 300, *Jheel Kurenja Milk Producers' Cooperative Society Ltd. & Anr. vs. D.D.A. & Ors*.

18. Before I proceed to discuss the legal position it would be important to revisit the statutory provision. Order 1 Rule 10(2) of

the Code of Civil Procedure reads as under:-

> "(2) Court may strike out or add parties.- The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and '*settle all the questions involved in the suit, be added*."

19. A reading of the statutory provision shows that the sweep of the legislative provision is controlled by the expression '*settle all the questions involved in the suit be added*'.

20. Let me clarify. An inquiry under Order 1 Rule 10(2) is not to focus on whether the applicant is a person who ought to have been joined as a necessary party to the suit. The focus of inquiry is limited to the question whether the applicant could be impleaded as a party on the premise that his presence before the Court may be necessary in order to enable the Court to effectually and completely adjudicate upon and settle the questions involved in the suit.

21. Shri Rajiv Endlaw, learned counsel for the petitioner vehemently contended that the applicant was not a necessary nor a proper party, nor its presence before the Court was necessary in order to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in the suit. Learned counsel urged that every plaintiff is a dominus litus and cannot be compelled to litigate against a person qua whom no relief has

been prayed for. Counsel further urged that the expression '*all the questions involved in the suit*' means only the questions or disputes between the parties to the litigation and do not include a question or dispute between one or more of the parties and a third party. Counsel further urged that the alleged agreement to sell in favour of the applicant does not create any interest in immovable property. It is a right in personam and remedy of the applicant is to enforce the rights in a suit of his own for specific performance, a right stated to have been already been exercised by the applicant

22. Rival submission of Shri Harish Malhotra, learned senior counsel was that by virtue of clause 7 of the agreement to sell, a right in presenti was created in favour of the applicant and since the stated tenancy was a mere device for the purchaser to enjoy possession of the suit property, applicant was entitled to bring to the notice of the Court its possessory rights under the agreement to sell so that in equity and in law, possession could be protected. Counsel further urged that matter in controversy in a suit has to be considered not only with reference to the case set up in the plaint but even the defence set up in the written statement. It was urged that the defendant had categorically pleaded that the rent agreement was a camouflage and real intention was to pay 15% interest per annum on the balance sale consideration by the applicant to the plaintiff with simultaneous enjoyment of possession by the purchaser. Even on said count, counsel urged

that the applicant was entitled to be impleaded as a defendant, if not as a necessary party, as a proper party.

23. Turning to the authorities cited at the Bar by learned counsel, suffice would it be to note that in *Pravat Kumar Misra's* case (supra) a third party claiming rival title to the suit property was held not entitled to be impleaded as a defendant in a suit filed by the plaintiff for recovery of possession of the suit premises from the tenant, on the ground, that a simple suit for recovery of possession cannot be converted into a complex title suit.

24. In *Jiwan Dass Rawal's* case (supra) it was held that a party claiming right under an agreement to sell cannot claim any right, title or interest in the property till sale is finalized for the reason an agreement to sell does not create a right, title or interest in the property agreed to be sold. It is a right in personam against the seller.

25. In *Dharam Singh's* case (supra) applicants claimed certain rights along with the plaintiff. It was held that the applicants cannot be impleaded as defendants.

26. In *Vithalbhai's* case (supra) a learned Single Judge of the Calcutta High Court opined that different rights may arise amongst different parties based on relationships amongst the parties inter-se, and that in a suit for possession by the tenant against the sub-tenant, the sub-tenant cannot resist claim of possession by disputing title or right to possession of the tenant

against the original landlord.

27. In *Smt.Sukumari Debi's* case (supra) it was held that in an eviction suit by a co-owner who was the landlord, other co-owners not being co-landlords cannot be arrayed as co-plaintiffs.

28. In *Evangelical Church's* case (supra) it was held that in an eviction suit by the landlord against the ex-employee for restoration of possession over premises allotted to the employee as a term of employment, person claiming to be the owner of the premises and disputing title of the plaintiff was not entitled to be impleaded as a party. Similar view was taken by the Rajasthan High Court in *Talib Hussain's* case (supra).

29. In the last authority cited by learned counsel for the petitioner, *Rama Chatterjee's* case (supra), in a suit filed by the plaintiff in his capacity as the managing trustee of a trust against a defendant alleging possession to be an act of trespass, applicant who questioned the right of the managing trustee to file the suit alleging that the property was not trust property was held not entitled to be impleaded as a defendant.

30. Turning to the decisions cited by learned counsel for the respondents, suffice would it be to note that in *Amit Kumar Shaw's* case, in a suit for partition, a transferee pendente lite who had acquired interest from a copartner was held entitled to be impleaded as a party in the partition suit inasmuch as it was held that such transferee has an interest in the subject matter of the litigation. It was held that addition of a party to a proceeding

does not solely depend on the question whether he has interest in the suit property. The question to be addressed is, whether the right of such person may be affected.

31. In *S.S.Bakshi's* case (supra), a co-owner was held entitled to be impleaded as a party in a suit for specific performance of an agreement to sell. It may be noted that in the suit filed by the prospective purchaser it was stated that he had purchased a specific portion of the joint property from a co-owner, limited to the share of the co-owner in the property. Party seeking impleadment was denying any such arrangement inter se the co-owners.

32. In *Jheel Kurenja's* case (supra), in eviction proceedings initiated under the Public Premises (Eviction of Unauthorized Occupants) Act 1971 initiated by DDA against the person in possession of land, the person in possession of the land was a member of the cooperative society and therefore the society was held entitled to be impleaded as a party in the eviction proceedings on the ground that all persons who have an interest in the subject matter of the dispute should be impleaded as a party in one proceedings so that separate trials are avoided and all parties are bound by the decision. A caveat was recorded : a person cannot be impleaded at his asking. Bona fides of the applicant, the plausibility of the claim and genuineness of the interest in the litigation has to be prima facie seen.

33. It was additionally held that a party would be a proper

party if it is interested in the result of the litigation and has the right to seek assistance of the Court in coming to a decision on the point in issue. It is not necessary that a relief is asked against said party.

34. Independent of the afore-noted decisions cited by learned counsel, a perusal of the commentaries under Order 1 Rule 10 of the Code of Civil Procedure reveal a plethora of decisions which have considered the ambit of the power of the Court in impleading a person as a proper party. The authorities have explained the meaning of the phrase '*all the questions involved in the suit*'.

35. The decisions illustrate a wide spectrum of instances when intervention was allowed and when refused.

36. From the decisions, no discernible principle governing the discretionary power of the Court emerges, for the simple reason, the spectrum of claims is fairly wide and therefore it would be inadvisable to cast the discretionary power in a straight jacket of an inflexible formula. However, one principle emerges, that the language employed in the rule vests a very wide discretion in the Court.

37. Given for myself, I would follow the dictum of Jackson J. in *Chidambaram Chettiar vs. Subramaniam Chettiar* AIR 1927 Madras 834: '*Court should deprecate any attempt to diminish that discretion by substituting special pronouncements in special cases for the actual language of the rule.*'

38. Really speaking, submission of Shri Rajiv Endlaw, learned counsel for the petitioner is that the expression 'all the questions involved in the suit' in sub-rule 2 of rule 10 of Order 1 must have a narrow meaning i.e. questions as between the parties to the litigation and not questions between any of the parties to the suit and a third party, even though touching the property which is the subject matter of the suit.

39. On the other hand, submission of Shri Harish Malhotra, learned senior counsel for the respondents is that acceptance of the narrow view would mean the addition of words which are not found in the section, namely, '*between the parties to the suit*'.

40. In the opinion reported as 1950-2 All ER 605 *Dollfus Mieget Compagnie S.A. vs. Bank of England* the precise nature of the interest of the party sought to be impleaded in the property in dispute was pointed out so as to justify his being impleaded as a party under Order 16 Rule 11 RSC corresponding to Order 1 Rule 10 in India.

41. In that case 64 identifiable gold bars belonging to a French company were looted by the Germans during the war on their occupation of France and were later seized by the allied armies. The custody of the gold bars was acquired by a tripartite commission, consisting of the representatives of the Government of UK, USA and France for the purposes of eventually distributing, in accordance with the provisions of the Treaty, the gold and

treasure looted by the Germans. The gold bars were conveyed to England and deposited by the Commission with the Bank of England. The French company instituted an action against the bank claiming delivery of the gold bars. The bank applied for an order to set aside the writ on the ground that the 2 foreign Government, USA and France had declined to submit to the jurisdiction of the English Courts. The claim of the company was upheld and leave was given to the bank to appeal to the House of Lords. At that stage the two governments, USA and France applied to be added as defendant to the action.

42. It is significant to note that in the application the applicants did not assert a title to the bars but they urged that if they should establish that they have possession of control of the bars through the bank the French company would fail to obtain an order from the Court in its favour by reason of the doctrine of immunity applicable to foreign sovereign states and therefore the applicants, the Government of USA and France would be entitled to retain possession and control over the bars and thus be able to dispose them of.

43. It was held that whether or not the applicants had a proprietary right in the subject matter of the action sufficient to entitle them to be joined as defendants, the true test lay not so much on an analysis of what were the constituents of the rights, but rather in what would be the result on the subject matter of the action if their rights could be established. It was held that the

applicants had a direct interest in the subject matter of the action which was similar to a proprietary right and was of such a nature as would entitle them to be joined as defendants as in their absence their claim could not be eventually put forward.

44. After referring to the decision in *Moser vs. Marsden*, 1892-1 Ch 487 in which it was held that the fact that the person's interest would be commercially affected by a judgment would be insufficient to make the person a party and that that person should be directly interested in the subject matter in dispute, Wynn Parry, J. observed as follows at pages 611-612:-

> "On the other side of the line in *Vavassur vs. K.Krupp*, (1878) 9 Ch D 351 to which I had already referred, which established that a proprietary right of the proposed defendant in the subject matter of the action is sufficient. The question here is; on which side of the line does this case fall? For the purposes of this application, the applicants do not assert a title to the property in question, and, therefore it cannot be asserted that they have a proprietary right as the phrase is used in (1878) 9 Ch D 351. What they assert is that if they can establish that they have possession or control of the property in question through the defendant bank, then, by virtue of the doctrine of immunity which apply to foreign sovereign states, 2 results might well follow (i) the plaintiffs must fail to obtain any order from this Court in their favour and (ii) the applicants will retain the possession and control over the remaining bars of gold and will be able to dispose of them. In other words, although the applicants do not assert title to the bars of the gold, the result of a successful intervention by them would be that as between the plaintiffs and themselves, they would for all practical purposes, be the owners. It seems to me that true test lies not so much in an analysis of what are the constituents of the applicant's rights but rather in what would be the result on the subject matter of the action if those rights could be established. That is the approach which I have made. Viewing the matter in this way, it is impossible, in my

> judgment, to say that the applicant have only an indirect interest of the nature which fell to be considered in 1892-1 Ch 487. They appear to me to have something more namely, a right which although may arise indirectly, viz. by the invocation of the doctrine of immunity and through the defendant bank as bailee nevertheless results in a direct interest in the subject matter of this action and is a right merely akin to the proprietary right which was under consideration in (1878) 9 Ch D 351. There is no authority directly bearing on the point but, on the analysis which I have made of the nature of the applicant's interest in the matter, I have come to the conclusion that I ought not to say that I have no jurisdiction to entertain the application on the short ground which counsel for the plaintiff puts forward, viz. that the applicants could not show a proprietary right, and, therefore did not come within the second of the three classes of cases to which I have referred but that I am dealing with right of such a nature as, on an application by the applicants in the position of the present applicants should result in an order that they be joined as defendants, provided it can be shown that in their absence the claim to the right will not effectually be put forward."

45. The decision brings out that the true test lies not so much in an analysis of what are the constituents of the applicant's rights but rather in what would be the result on the subject matter of the action if those rights could be established.

46. In the report published as 1956-1 All ER 273 *Amon vs. Raphael Tuck & Sons Ltd.*, the aforesaid view was followed. In that case the plaintiff filed an action against the defendants for damages and injunction on the ground that the plaintiff was the first inventor of a new design of adhesive dispenser in the shape of a pen, that the plaintiff disclosed to the defendant the details of the invention in the course of negotiations with the defendant for marketing the pen and that the defendant had wrongfully made

use of the information by manufacturing an adhesive dispenser of the same design as invented by the plaintiff. The defendant, while resisting the claim applied under Order XVI Rule 11 R S C to join as defendant a third party, urging amongst other things that the third party was the first inventor of the adhesive dispenser. It was held that the presence of the third party was necessary to enable the court to adjudicate completely the subject matter in dispute as the enjoyment of the legal right of the third party would be curtailed by the relief asked for by the plaintiff in the action.

47. Delvin, J. explained the scope of the rule in these terms at page 279.

> “It is not I think disputed that 'the cause or matter' is the action as it stands between the existing parties. If it were otherwise then anybody who showed a cause of action against either a plaintiff or defendant could of course say that the question involved in his cause of action could not be settled unless he was made a party. Counsel for the defendant does not contend for so wide a construction as that: but he submits that, if the intervener has a cause of action against the plaintiff relating to the subject matter of existing action the Court has power to join the intervener so as to give effect to the primary object of the order, which is to avoid multiplicity of actions. In the present case he submits that the subject matter of the dispute between the existing parties is the “ownership”. If I may so put it, of an invention: the plaintiff claims that he is the owner of it and the intervener alleges that he is, and both disputes ought to be determined at the same time. This construction stresses the amplitude of the closing words of the passage which I have just cited from Order 16 Rule 11 'all the questions involved in the cause or matter.' The alternative construction treats the opening words as dominant. 'All the questions involved' is a phrase that unless it is cut down would be impossibly wide. It is cut down, the

plaintiff submits by the opening words of the passage which I have cited. The intervener must be a party whose presence is necessary to enable all questions in the action to be adjudicated on and settled, but the question must be one which has to be adjudicated on in the issue between the existing parties and not in any new issue raised by an intervener. The criticism that at once suggests itself of this construction is that it is impossible narrow. If the adjudication is limited to something that lies between the plaintiff and the defendant what parties can be necessary to it except the plaintiff and the defendant? The court is for this purpose concerned only with action “in person and in such actions either the necessary defendant is sued or the action fails. If all the parties who ought to have been joined, under the first limb of the rule are joined, who are the necessary parties contemplated by the second limb”

48. Answering the question, Delvin, J. further observed as follows at pages 289-290:-

“Counsel for the plaintiff next submits that the intervener's interests cannot be affected anyway because if the plaintiff is wrong, there will be no injunction: and if he is right, the injunction can be granted only on the basis that the duty of confidence was owed to the plaintiff and not to the intervener. This argument in my opinion, misconceives the point. Whenever a plaintiff seeks to restrain a defendant from dealing with his property and an intervener claims that the property is his, the plaintiff can say 'If I am wrong I shall not get an injunction and the intervener's right will not be affected: if I am right the intervener has no rights to be affected anyway.' The point is that the intervener is entitled to be heard on the issue whether the plaintiff is right or wrong so that he may be bound by the order made.

The final submission of counsel for the plaintiff is more far-reaching than the others. He submits that the action an the intervener's claim are concerned with rights in contract and not rights of property and therefore the case does not come within the term “proprietary right”as set out in the note in Annual Practice 1995 at page 232. I am not of course required to construe the phrase as if it were contained in a statute. If I were I should see no reason why rights under a contract should not be

> called proprietary rights just as much as rights to physical property. The phrase, however, is not used definitely. The three categories formulated in the note are not exhaustive. Indeed, I do not think that they should be treated as having been formulated independently. There is one common principle running through them all, and, for my part, I should prefer to apply a test based on that principle rather than to enquire whether the case to be determined falls into one or other of the three classes. There is not, for example any real distinction between the cases which related to specific performance and those which related to proprietary rights. As Wynn Parry, J. said in 1950-2 All ER 605 at page 611.
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> It seems to me that the true test lies not so much in any analysis of what are the constituents of the appellant's rights, but rather in what would be the result on the subject matter of the action if those rights could be established.
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> I respectfully agree with that. I think that the test is May the Order for which the plaintiff is asking directly affect the intervener in the enjoyment of his legal rights?
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> It may be true as counsel for the plaintiff submits that the authorities so far have been dealing with rights to physical property, but in my judgment the principle applies equally to contractual rights. I think that in this case the test is satisfied that I have jurisdiction to make the Order and that is one which having regard to the question involved in the action, it is proper that in the exercise of my discretion I should make."

49. Decision brings out that the principle relating to impleadment in decisions involving rights to physical properties are equally capable of being applied to contractual rights.

50. Turning to the facts of the instant case, in the written statement filed by the defendant, it has been explained that the so called tenancy agreement is a camouflage. Real agreement between the parties was that the plaintiff would sell the suit

property to the applicant and pending finalization of the execution of the sale deed, possession would be handed over; for the balance sum of Rs.4 lacs payable by the applicant to the plaintiff at the time of execution of the sale documents, interest @15% per annum on the balance sum payable would be paid. Since balance sale consideration is Rs.4 lacs, interest @15% per annum comes to Rs.60,000/- per annum. Monthly interest comes to Rs.5,000/-. This is the rental figure. In the written statement filed, specific reference has been made to clause-7 of the agreement to sell between the plaintiff and the applicant.

51. At a sports event relating to track and field competition, in a 400 metres race, it could be insisted that only the participants to the race have a right to be on the track. They must have an unobstructed right to run the race. But, in a relay race the aforesaid would not hold true. The baton has to be passed on. As the first runner reaches the end of his run, the next runner has to be on the field to receive the baton and run ahead.

52. Claim predicated in the defence as per written statement and by the applicant is akin to a relay race.

53. The aforesaid illustration can be given a legal shape if one peruses Section 55 of the Transfer of Property Act 1882. The said provision deals with the rights and liabilities of buyers and sellers. Clause (b) of sub section 6 of Section 55 of the Transfer of Property Act 1882 reads as under:-

"**55. Rights and liabilities of buyer and**

> **seller.**- In the absence of a contract to the contrary, the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:-
>
> (6) The buyer is entitled-
>
> (a) .....
>
> (b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission."

54. The buyer is entitled to a charge on the property as against the seller and all persons claiming under him to the extent of the seller's interest in the property for the amount of any purchase money probably paid by the buyer provided the purchaser has not improperly declined to accept delivery. The law on this matter is well settled and it would be sufficient to refer to only 2 decisions.

55. In *Abdul Hamid Khan vs. Mohamed Ali Humayum*, AIR 1952 Bom.67 it was held that the charge under S.55(6)(b) of the Transfer of Property Act for the pre-paid purchase money comes into existence the moment the buyer pays part of the purchase money towards the sale transaction and that the same is available not only against the seller but also against the

purchaser from the seller irrespective of the question whether the said purchaser had or had not noticed a charge, in view of the fact that it is a statutory charge under S.55(6)(b) independent of any question of notice. The same view was taken by a Bench of the Bombay High Court in *Jibhaoo vs. Ajab Sing*, AIR 1953 Bom.145. In that case, the entire price had been paid to the vendor in pursuance of a sale which however was found to be invalid. The purchaser applied under the Bombay Agricultural Debtors' Relief Act for his claim being upheld as a mortgagee with regard to the purchase price paid by him and it was held that under S.55(6)(b) the purchaser was entitled to a charge over the property agreed to be sold the moment the purchase price was paid by him.

56. In the report published as 1892 ILR 16 Bom. 608 *Sadhoo vs. Ram Govind*, it was observed that in a suit for partition, all persons interested in the property to be divided must be brought before the Court and that a purchaser or a mortgagee under a co-parcener is a proper and even a necessary party to the suit for partition. The reason was that the right of an alienee from an individual co-parcener, whether as purchaser or as a mortgagee, though held to be a mere equity to have the property alienated allotted to the share of the alienating partner, but was in recognition of a right in such alienee, even a mortgagee, to successfully challenge the partition on the ground of fraud or collusion.

57. If a purchaser or a mortgagee under a co-parcener who

has a mere charge by operation of law to proceed against the substituting property could be impleaded as a party, as was so held by the Supreme Court in *Amit Kumar Shaw's* case (supra), in the instant case, the crux of the question would be why this principle should not apply to a person who has got an agreement to sell in his favour just because such an agreement is merely executory and does not create an interest in movable property.

58. The answers are to be found in the passages noted herein above from the opinions in *Amon's* case (supra) and *Dollfus Mieget Compagnie's* case (supra).

59. Contractual rights lesser than proprietory rights but similar to proprietory rights would be sufficient interest attracting the participation of the applicant in the settlement of all the questions involved in the suit if there is a possibility that the decision in the suit is likely to affect the said contractual interest. Section 55(6)(b) is a sufficient interest, statutorily recognized in favour of a prospective buyer.

60. Had there been no clause akin to clause-7 in the agreement to sell between the parties and had the tenant been a complete stranger i.e. having no concern with the applicant, issue would have arisen in a totally different context. Different principles would then have applied. But, the peculiar nature of the agreement to sell in the instant case makes a material difference.

61. A passing reference may also be made to the decision of

the Supreme Court reported as 1998 (8) SCC 466 *Baldev Singh vs. P.N.B & Ors*. It is a short order. It reads as under:-

> "1. Special leave granted.
>
> 2. Heard learned counsel for both the sides.
>
> 3. Respondent 2, Santokh Singh has filed a suit in the Court of Senior Sub-Judge, Jullundur for a declaration that the sale deed allegedly executed by Defendant 1, Baldev Singh, in favour of Defendant 2, Harbhajan Kaur, acting as power of attorney of the plaintiff is null and void and consequently the lease deed dated 10.2.1993 is null and void and not binding on the plaintiff. There are certain other consequential reliefs also. The question of title may, therefore, arise for determination in that suit.
>
> 4. The present special leave petition has been filed by Baldev Singh against the order dated 1.6.1995 in Civil Revision No.2174 of 1995 whereby the High Court dismissed the revision from the order of the Additional Rent Controller dated 6.4.1995 allowing the application of Santokh Singh for being impleaded as a party under Order 1 Rule 10 CPC. The learned counsel for the appellant herein contends that the question of title cannot be gone into in the proceedings before the Rent Controller and the Rent Controller was in error in allowing the application and the High Court too was in error in summarily rejecting his revision. The situation which emerges is that if Santokh Singh cannot be impleaded in the rent proceedings, wherein he would certainly raise the contention in regard to his title to the property, he would be without a remedy and the rent would be collected by Baldev Singh and thereafter he may have to take further proceedings against Baldev Singh, thus, multiplying the litigation. Therefore, the appropriate course would appear to be that rent suit should await the decision of the civil court on the question of title but in the meantime the tenant, i.e., the Punjab National Bank should go on depositing the rent/mesne profits in the Rent Control Court and the question of payment of the amount would be a matter that may be decided by the appropriate court at the appropriate point of time. The parties would be at liberty to move the civil court for an early hearing.

> 5. In the meantime, the Rent Controller may, at such intervals deemed appropriate, invest the rent in fixed deposits so that it may yield interest. The proceedings before the Rent Controller will remain stayed till the suit is disposed of. The present proceedings will stand disposed of accordingly."

62. The aforesaid short but incisive decision of the Supreme Court guides how multiplicity of proceedings and futile litigation has to be avoided.

63. For the reasons noted herein above the impugned order is sustained.

64. The petition is dismissed.

65. However, keeping in view the nicety of the question raised in the petition and placing on record my appreciation for the learned counsel who very ably assisted me at the hearing, it has to be recorded that the dismissal does not attract any costs.

March 22, 2007 **(PRADEEP NANDRAJOG)**
dk **JUDGE**